

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LARRY L. HUGHES, JR.,

Appellant,

v.

STATE OF WASHINGTON EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

No. 38009-9-II

UNPUBLISHED OPINION

Hunt, J. — Larry L. Hughes, Jr., appeals the Employment Security Department (Employment Security) Commissioner’s conclusion that his (Hughes’) receipt of overlapping workers’ compensation benefits and unemployment benefits amounted to “willful nondisclosure” of these benefits in violation of RCW 50.20.085. Hughes argues that the Commissioner erred in (1) concluding that he (Hughes) was liable for refunding the overpayment and ineligible for waiver because his actions rose to the level of “willful nondisclosure” and (2) finding that Hughes had personally deposited his benefit checks into his bank account. Because Hughes knew that he was receiving both benefit payments concurrently, but failed to disclose this to Employment Security, we affirm the Commissioner’s decision to assess a \$22,630 overpayment against Hughes, which

he must pay back to Employment Security.

FACTS

I. Injury and Compensation

A. Injury

In 1995, an on-the-job car accident caused traumatic brain injury to Larry L. Hughes. Hughes spent three weeks in intensive care and one year in the hospital. As part of his recovery process, Hughes “had to learn to walk, talk, everything all over again.” His injuries caused lasting damage to his memory, behavior, and mood.

Although Hughes still suffered from medical issues related to his injuries, he began looking for work in 1998. He first worked as a dock loader for approximately one year. Next, he worked at Sunoco, where he stayed until July 2001. Hughes’ behavioral problems caused his positions at both companies to end.

After being fired from Sunoco, Hughes met regularly with psychologist Thomas Stallone. Stallone’s February 2002 Treatment Summary noted that (1) Hughes’ health condition “disrupts his life, the nature of his emotions, the purpose they serve”; (2) Hughes “had some difficulty consolidating and incorporating what he was being taught due to short term memory deficits”; and (3) “[w]hile demonstrating a willingness to learn and an eagerness to again earn a living, [Hughes’] ability to learn therapeutic concepts and practice them in situation[s] meaningful to him is deficient.” Commissioner’s Record (CR) at 95.

B. Workers’ Compensation and Unemployment Benefits

Hughes applied for both workers’ compensation and unemployment benefits. Between

September 5, 2001, and May 15, 2006, he received weekly checks from the State Department of Labor and Industries (L&I) for workers' compensation time loss benefits. During this time, between September 8, 2001, and November 9, 2002, he also received unemployment benefits, which overlapped with his receiving workers' compensation during a 14-month period.

II. Procedure

A. Overpayment Decision

On June 29, 2006, the State of Washington Employment Security Department (Employment Security) notified Hughes by letter that he had been receiving both workers' compensation and unemployment benefits in violation of RCW 50.20.085, which prohibits a person's simultaneous receipt of both benefits. In this letter, Employment Security concluded that Hughes had "knowingly withheld material facts" to obtain both benefits, and it denied waiver of overpayment.¹ Employment Security advised Hughes that his receipt of both payments resulted in an overpayment of \$22,630 that Hughes must repay. The letter also informed Hughes that he had 30 days to appeal the decision.

B. Administrative Review

1. ALJ Hearing

Hughes appealed Employment Security's overpayment decision to the Office of Administrative Hearings. An Administrative Law Judge (ALJ) heard testimony about the circumstances surrounding Hughes' receipt of both workers' compensation and unemployment benefits. The ALJ admitted several exhibits into evidence, including a "Schedule of Claims

¹ RCW 50.20.190(2) allows the commissioner to waive an overpayment if it was not the result of fraud, misrepresentation, willful nondisclosure, or fault attributable to the individual.

Report,” compiled by Employment Security, which demonstrated that between September 8, 2001, and November 9, 2002, Hughes had received 62 consecutive weekly payments from Employment Security in the amount of \$365 each.

a. Hughes’ testimony

Hughes testified that no one told him he could not receive workers’ compensation benefits and unemployment benefits at the same time. Hughes did not deny having applied for workers’ compensation benefits, although he could not remember when he had applied. Hughes acknowledged that he was currently receiving workers’ compensation payments of \$940 per month. He testified that his memory problems interfered with his ability to recall “day-to-day stuff.” Similarly, Hughes only “vaguely” remembered applying for unemployment benefits, stating, “I just remember filing for it. And that’s all I can say.” But he testified that he received the payments, “By check, I think,” which he deposited into his bank account, adding, “Yeah, I’m sure I did.”

When asked whether anyone was helping him when he was filing for benefits, Hughes responded, “No, I don’t have a clue.” Moments later, however, Hughes testified that Stallone may have helped him apply for the workers’ compensation benefits. Hughes also testified that although he did not remember how he had filled-out the weekly requests for unemployment benefits, “I think I went down to the employment office. That’s what you always do before.” Hughes also testified that although he did not recall whether anyone was helping him file for unemployment each week, he believed the filing occurred by phone and that he did it himself. On cross examination, counsel for Employment Security continued this discussion as follows:

WOHLERS: Somebody was helping you call in each week, or were you calling in? I guess I didn't get that clear when you call unemployment.

HUGHES: I believe somebody was helping me. I don't want to lie (unintelligible) tell you (unintelligible)—

WOHLERS: Were they verbally saying the questions out loud when they were calling, did they tell you what the questions were and ask you yes or no, do you remember that at all?

HUGHES: I'm not sure. I don't know if they answered it for me, I don't remember, sir.

WOHLERS: When you were getting both unemployment and worker's[sic] comp at the same time did you think maybe there's something wrong here, did you think that, did that come to you at all?

HUGHES: Honestly, no. I just thought that—I was not aware.

WOHLERS: Did you or somebody help you call Employment Security and ask about it at all? Did you call us?

HUGHES: No. Not that I can recall, I don't think so.

CR at 47-48.

Counsel then mentioned that Employment Security required claimants to answer questions each week as part of the procedure for filing for unemployment benefits and asked Hughes why he had answered “no” each week to the question “have you applied for or received worker's[sic] compensation?” Hughes responded, “I don't know—I honestly don't.” Counsel turned to a different provision in the unemployment benefit questionnaire, where Hughes had marked “yes” each week to the question about whether he was “physically able and available for work each day” and asked why Hughes had marked “yes.” Hughes answered, “I don't remember all of this.”

On redirect examination, Hughes' counsel, Vicky Daniels, directed him to a document addressed to L&I, which contained the following note: “This is to confirm and give permission to have Marlyn Coster discuss and communicate via fax, phone, computer, etc. any issues regarding my claim.” When asked who Coster was, Hughes responded, “She was a friend of mine helping

me.” Hughes testified that (1) Coster helped him file his claim for workers’ compensation; (2) she might have assisted him with filing his unemployment claims because they were living together at the time; and (3) aside from Coster² and his current roommate, Marjorie Bamford, no one else helped him with the paperwork for unemployment or workers’ compensation benefits.

b. Bamford’s testimony

The ALJ questioned Bamford about her personal knowledge of Hughes. Bamford described Hughes as a close personal friend and roommate, who spends two to three hours per day with her. She stated that (1) she had known Hughes since fall 2004 (two years before this administrative hearing); but (2) she did not know Hughes during the period from fall 2001 to fall 2002 when Hughes received unemployment benefits and workers’ compensation benefits concurrently; (3) she currently helped Hughes with his paperwork because “his short-term memory is very poor”; (4) Hughes brought her the Employment Security’s redetermination letter and asked her to compose a letter of appeal without indicating that he had known about the overpayment issue before receiving the letter; and (5) when she had explained the documents to Hughes, he still did not completely grasp what they meant because “there’s so much overwhelming with his memory loss [that] I could sit down and go through it with him again and it would still be difficult for him to understand a lot of what’s in there.”

c. ALJ’s decision

After the hearing concluded, the ALJ entered an Initial Order, Findings of Fact, and Conclusions of Law. The ALJ made the following findings of fact: (1) Hughes was “seriously

² Coster did not appear as a witness.

injured” in an automobile accident, which caused “long-term problems for [his] memory and mood”; (2) Hughes “is not able to comprehend to a substantial degree the writing in the exhibits admitted to the record,” and he “has not been able to understand the correspondences in this case without assistance”; (3) Hughes has lived with Bamford since early 2005; (4) Hughes does not recall whether he received Employment Security’s 2006 redetermination letter; (5) Hughes received unemployment benefits for 62 weeks, between September 8, 2001, and November 9, 2002 (at \$365 per week, totaling \$22,630), while receiving workers’ compensation at the same time; (6) In all relevant weeks, Hughes was “not able to work”; (7) Hughes “has little if any recollection about the filing of his weekly claims for unemployment benefits,” but he “vaguely recalls this was done by telephone,” and “Maryln Coster acted as [Hughes’] agent with his approval and assisted him in the filing of his claim for unemployment benefits”; and (8) Hughes started claiming unemployment benefits shortly after being discharged from Sunoco in July 2001.

The ALJ’s Conclusion of Law No. 10 stated:

It is not established by clear, cogent and convicting evidence that [Hughes] knowingly withheld information with the intent to obtain unemployment benefits improperly. Considering the totality of [Hughes] testimony, and [Hughes] mental status at the time in question, there is insufficient evidence to conclude there was knowing misrepresentation by the higher standard of proof

CR at 251. Conclusion of Law No. 13 stated:

With regard to the question of fault, we turn to WAC 192-220-020. A claimant who is at fault is not allowed waiver of the overpayment, based on equity under the overpayment statute—RCW 50.20.190. Fault may be found if claimant is paid benefits in an amount greater than he is entitled, and he accepts and retains those benefits, and the payment of benefits is based on incorrect information or failure to furnish information which claimant should have provided and claimant had notice the information should have been reported. Claimant may be considered at fault even if all relevant information is provided, if the overpayment is the result of

payment claimant should reasonably have known was improper. In deciding whether or not a claimant is at fault, the department should consider education, mental abilities, emotional state, experience claiming unemployment benefits, and other elements of claimant's personal situation which affect his knowledge and ability to comply with reporting all relevant information.

CR at 251.

Because the ALJ determined that Coster acted as Hughes' agent during the relevant time period (Finding of Fact No. 7), he concluded that Hughes was at fault for "willful nondisclosure" and, thus, ineligible for consideration of waiver. RCW 50.20.190(2). On this basis, the ALJ ordered Hughes to repay the \$22,630 overpayment to Employment Security.

2. Employment Security Commissioner's Review

Hughes filed a Petition for Review with the Employment Security Commissioner, asking him to set aside the ALJ's decision. The Commissioner adopted the ALJ's Findings of Fact, except for the last sentence of Finding No. 7 that "Marlyn Coster acted as [Hughes'] agent with his approval and assisted him in the filing of his claim for unemployment benefits." The Commissioner reasoned that the evidence did not show that Hughes had appointed Coster his agent for the purpose of filing claims for unemployment benefits.

The Commissioner also adopted the ALJ's Conclusions of Law, except for Conclusion No. 13, for which he substituted the following conclusion:

Instead of conclusion No. 13 we note that RCW 50.20.160(4)(c) permits the Department to make a redetermination in the event of willful [sic] nondisclosure. Here, claimant filed weekly claims and received weekly unemployment benefit checks for fourteen months while simultaneously receiving workers' compensation benefits every two weeks. *Either he alone or he and Ms. Coster together informed the Department each week that he was able to work while, at the same time, he was receiving biweekly benefits for being unable to work. He personally deposited the Department's payments into his bank account. On this evidence, we*

are satisfied that his failure to either question the Department about his conflicting reports or to inform it of the fact of the simultaneous claims and payments was wilful[sic]. In that circumstance, the Department's "determination" notice issued June 29, 2006 is a proper redetermination.

On the basis of the foregoing, we conclude that claimant is not entirely free from fault in the matter of his overpayment and that, accordingly, he is liable for refund of the overpayment.

CR at 265 (emphasis added). The Commissioner otherwise affirmed the ALJ's decision, ordering Hughes to repay the \$22,630 overpayment.

C. Judicial Review

Hughes unsuccessfully appealed the Commissioner's decision in Thurston County Superior Court. Hughes now appeals the Commissioner's decision to us.

ANALYSIS

I. Willful Nondisclosure

The parties agree that (1) Hughes did not knowingly misrepresent or fraudulently withhold information from Employment Security and (2) Hughes was receiving both workers' compensation and unemployment benefits during the same 62-week period. Thus, the main issue before us is whether Hughes' failure to disclose information about his benefit eligibility rose to the level of "willful nondisclosure" for purposes of redetermination under RCW 50.20.160(4)(c) and required repayment. We agree with the Commissioner that Hughes' actions in knowingly receiving overlapping workers' compensation and unemployment benefits constituted "willful nondisclosure" under the statute and, therefore, he is at fault for receiving the overpayment and must repay it to Employment Security.

A. Standard of Review

When reviewing legal questions, we may substitute our judgment for that of the administrative agency, though we accord substantial weight to the agency's view of the law. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). While we give deference to the agency's factual findings, we review the agency's application of the law de novo. *Dermond v. Employment Sec. Dep't*, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997). When reviewing a final administrative decision of a commissioner, we determine only whether substantial evidence supports the factual findings and, if so, whether the findings in turn support the conclusions of law and judgment. *Nguyen v. State Dep't of Health Med. Quality Assurance Comm.*, 144 Wn.2d 516, 530, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002).

We grant relief from an agency order if it “is not supported by evidence that is substantial when viewed in light of the whole record before the court.” *Nguyen*, 144 Wn.2d at 530 (quoting RCW 34.05.570(3)(e)). The evidence in the record is substantial when it is enough to persuade a fair-minded person of the truth of the declared premise. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996). Such is the case here.

B. “Willful Nondisclosure”

Hughes first argues that the Commissioner erred in concluding that his (Hughes') actions amounted to “willful nondisclosure,” while simultaneously concluding that the record did not support that Hughes “knowingly withheld or misrepresented information.”³ See Br. of App. at

19. We disagree.

1. Redetermination and Recovery of Overpaid Benefits

RCW 50.20.160(4) provides: “A redetermination [of eligibility for unemployment benefits]^[4] may be made at any time: . . . (c) in the case of fraud, misrepresentation, or willful nondisclosure.” And RCW 50.20.085 provides for “[d]isqualification for receipt of industrial insurance^[5] disability benefits” when an individual is receiving unemployment benefits:

An individual is disqualified from benefits with respect to any day or days for which he or she is receiving, has received, or will receive compensation under RCW 51.32.060 or 51.32.090^[6].

RCW 50.20.190 provides for recovery of overpaid unemployment benefits as follows:

(1) An individual who is paid any amount as benefits under this title to which he or she is not entitled shall, unless otherwise relieved pursuant to this section, be liable for repayment of the amount overpaid. The department shall issue an overpayment assessment setting forth the reasons for and the amount of the overpayment. . . .

(2) The commissioner may not waive an overpayment if the commissioner finds that the overpayment was *not the result of fraud, misrepresentation, willful nondisclosure, or fault attributable to the individual and that the recovery thereof would be against equity and good conscience*: PROVIDED, HOWEVER, That

³ The Commissioner adopted this conclusion from the ALJ’s decision. ALJ Conclusion of Law No. 10; CR at 264.

⁴ RCW 50.20.010(1) establishes the following unemployment “[b]enefit eligibility conditions”:

(1) An unemployed individual shall be eligible to receive waiting period credits or benefits with respect to any week in his or her eligibility period only if the commissioner finds that:

. . . .

(c) He or she is able to work, and is available for work in any trade, occupation, profession, or business for which he or she is reasonably fitted.

⁵ “Industrial insurance” refers to workers’ compensation benefits.

⁶ “Compensation under RCW 51.32.060 or 51.32.090” refers to unemployment benefits.

the overpayment so waived shall be charged against the individual's applicable entitlement for the eligibility period containing the weeks to which the overpayment was attributed as though such benefits had been properly paid.

RCW 50.20.190(1)(2) (emphasis added).

2. "Fault" under WAC 192-220-020

WAC 192-220-020 uses the following method to determine "fault" for overpayment of unemployment benefits:

(1) When an overpayment occurs, the department will make a finding of fault or nonfault based on information provided by you and your employer and from information contained in the department's records. After reviewing all such information, *you will be considered to be at fault when the overpayment is:*

(a) *The result of fraud, misrepresentation, or willful nondisclosure;*

....

(d) Based on the presence of all of the following three elements:

(i) You were paid benefits in an amount greater than you were entitled to receive and you accepted and retained those benefits; and

(ii) The payment of those benefits was based on incorrect information or a failure to furnish information which you should have provided as outlined in the information for claimants booklet, claimant directives and other reasonable written communications issued by the department; or information which you caused another person to fail to disclose; and

(iii) You had notice that the information should have been reported.

....

(3) In deciding whether or not you are at fault, the department will also consider education, *mental abilities, emotional state, your experience with claiming unemployment benefits, and other elements of your personal situation which affect your knowledge and ability to comply with reporting all relevant information.*

Former WAC 192-220-020 (emphasis added).⁷

3. Commissioner's "Inconsistent" Conclusions

⁷ The legislature amended WAC 192-220-020 on February 18, 2009. We appreciate Hughes' inclusion in his Brief of Appellant of the version of this code that was in effect during his administrative proceedings.

The State notes that “knowing misrepresentation” and “willful nondisclosure” represent different bases for redetermination under RCW 50.20.160(4)(c) and, thus, the Commissioner’s conclusion that Hughes made no “knowing misrepresentation” did not preclude his (the Commissioner’s) conclusion that Hughes engaged in “willful nondisclosure.” Br. of Resp. at 17, 18. But Hughes appears to argue that because both of these bases include a “knowledge” element, the Commissioner’s conclusion that he (Hughes) did not knowingly withhold information from Employment Security precludes the Commissioner’s conclusion that Hughes’ conduct rose to the level of “willful nondisclosure.”⁸

a. “Willful nondisclosure” distinguished from “knowing misrepresentation”

Contrary to Hughes’ argument, the Commissioner did not broadly conclude that Hughes lacked knowledge of receiving overlapping unemployment and workers’ compensation benefit payments. Conclusion of Law No. 10. Instead, the Commissioner narrowly concluded that Hughes did not knowingly withhold information “with the intent to obtain benefits improperly.” Although this conclusion specifically addresses Hughes’ “intent to obtain benefits improperly,” it does not address Hughes’ knowledge of simply receiving the benefits. Thus, the Commissioner’s conclusion that Hughes acted without knowledge or “intent” to receive benefits “improperly” does not preclude the Commissioner’s additional conclusion that Hughes knew he was receiving both benefits.

As the State notes, in Conclusion of Law No. 10, the Commissioner focused on “knowing

⁸ We note that although Hughes challenges the Commissioner’s Conclusion of Law No. 13, he does not assign error to any other finding of fact or conclusion of law.

misrepresentation,” which differs from “willful nondisclosure” as a basis for making a redetermination under RCW 50.20.160(4)(c). Br. of Resp. at 18. Establishing “knowing misrepresentation” requires proof of “clear, cogent, and convincing evidence” of intent to defraud. *Engbrecht v. Employment Sec. Dep’t*, 132 Wn. App. 423, 428-29, 132 P.3d 1099 (2006), *review denied*, 159 Wn.2d 1005 (2007).

In contrast, establishing “willful nondisclosure” requires proof of merely “possessing knowledge” of *nondisclosure*. *In re Potts*, Employment Sec. Comm. Decision 425 (1959). Thus, the Commissioner’s conclusion that “there is insufficient evidence to conclude there was knowing misrepresentation by the higher standard of proof” in no way precludes or undermines the Commissioner’s conclusion of “willful nondisclosure” by a different, and lesser, standard of proof.

b. Definition of “willful nondisclosure”

Hughes argues that Employment Security’s redetermination was invalid because there was no proof of his “willful nondisclosure.”⁹ Br. of App. at 28. But he fails to provide a definition of “willful nondisclosure” or a description of the kind of action that rises to this level in the context of receiving unemployment benefits. Br. of App. at 28. The State asserts that “proof of nondisclosure requires a lower degree of intentionality” than knowing misrepresentation, which is “more akin to negligent oversight or inadvertence.” Br. of Resp. at 22, 26.

⁹ Hughes also states that this redetermination occurred “after nearly four years had elapsed since [Hughes] received his last unemployment check.” In response, we note that RCW 50.20.160(4) places no time limit on Employment Security’s ability to conduct a redetermination when the Commissioner finds that a person procured benefits through fraud, misrepresentation, or willful nondisclosure.

In *Potts*,¹⁰ the Employment Security Commissioner discussed the “knowledge” element of “willful nondisclosure,” stating:

“Nondisclosure” is not a synonym for “fraud” or “misrepresentation,” *but the term does imply and presuppose the possession of knowledge* which is not imparted either through inadvertence or by design. If one fails to disclose knowledge intentionally (i.e. design) when he has a duty or obligation to speak, his actions are fraudulent. Because the provisions of [RCW 50.20.160(3)] specifically cover the situation of fraud, it is felt that the term, “nondisclosure” (as it appears in the statute) *must relate to circumstances wherein an individual possessing knowledge or information fails to disclose [the] same through inadvertence or negligent oversight.*

In re Potts, Employment Sec. Comm. Decision 425 (1959) (underlining included, emphasis added in italics).

Although *Potts* is an older administrative decision, which is not binding on our court, it provides guidance in clarifying the kind of action that rises to the level of “willful nondisclosure.” First, *Potts* underscores the distinction between “misrepresentation” and “inadvertent failure to disclose,” noting that while both phrases include a “knowledge” component, “nondisclosure” under RCW 50.20.160(3) “must relate to circumstances wherein an individual possessing knowledge or information fails to disclose [the] same through inadvertence or negligent oversight.” *In re Potts*, Employment Sec. Comm. Decision 425 (1959). Second, *Potts* establishes that a claimant’s mere “inadvertence or negligent oversight” rises to the level of “willful nondisclosure.”

Applying *Potts*’ analysis here, we hold that Hughes’ conduct rose to the level of “willful nondisclosure” because he possessed knowledge of simultaneously receiving both workers’

¹⁰ The State appended *Potts* to its Brief of Resp. at Appendix C.

compensation and unemployment benefits during a 62-week period, yet he failed to disclose this information to Employment Security. Significantly, Hughes does not dispute that he applied for both benefits, nor does he deny that he received both benefits at the same time. Hughes does not deny that (1) to obtain unemployment benefits, he personally filed claims with Employment Security week after week for 62 consecutive weeks; (2) he deposited the weekly benefit payments (\$365) into his bank account; and (3) during the period when he filed for unemployment benefits each week, he repeatedly answered “no” to the question about whether he had applied for or received workers’ compensation, and he repeatedly answered “yes” to the question about whether he was “physically able and available for work each day.”

Despite Hughes’ assertion at the ALJ hearing that he could not recall the details of when or how he received the workers’ compensation and unemployment benefits, his repeated failure to report his receipt of both benefits constitutes an act of “willful nondisclosure,” as articulated in *Potts*. Even if Hughes’ act of receiving both benefits at the same time was inadvertent, as he claims, he nevertheless repeatedly indicated that he was not receiving workers’ compensation when he applied for unemployment benefits, knowingly received the \$22,630 overpayment, and deposited this amount into his bank account; thus, there is no question that Hughes possessed knowledge of receiving this payment. *See In re Potts*, Employment Sec. Comm. Decision 425 (1959).

Accordingly, after reviewing the Commissioner’ application of the law de novo, but according substantial weight to the agency’s view of the law, as represented by the Commissioner, we hold that the Commissioner did not err in concluding that Hughes’ failure to notify

Employment Security that he was receiving both workers' compensation and unemployment benefits rose to the level of "willful nondisclosure." *Sellers*, 97 Wn.2d at 325; *Dermond*, 89 Wn. App. at 132.

C. Challenged "Finding of Fact"

Finally, Hughes argues that substantial evidence fails to support the factual finding "hidden" in the Commissioner's Conclusion of Law No. 13.¹¹ Br. of App. at 24. This argument fails.

In Conclusion No. 13, the Commissioner concluded that Hughes' actions rose to the level of "willful nondisclosure" because (1) "[e]ither [Hughes] alone or he and Ms. Coster together informed [Employment Security] each week that he was able to work while, at the same time, he was receiving biweekly benefits for being unable to work"; and (2) Hughes "personally deposited [Employment Security's] payments into his bank account." Contrary to Hughes' argument, substantial evidence supports the Commissioner's "finding" in Conclusion No. 13. We review this "finding" in two parts.

First, we turn to the Commissioner's finding that "[e]ither [Hughes] alone or he and Ms. Coster together informed [Employment Security] each week that he was able to work." At the administrative hearing, Hughes testified that, although he did not remember how he filled-out the weekly unemployment benefit requests, "I think I went down to the employment office. That's what you always do before." Hughes also testified that although he did not recall whether anyone was helping him file for unemployment each week, he believed the filing occurred by phone and

¹¹ We treat statements of fact included within conclusions of law as findings of fact. *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 903, 792 P.2d 1254 (1990).

that he did it himself. Additionally, when the State’s counsel asked Hughes whether someone was helping him call in to claim unemployment each week, Hughes responded, “I believe somebody was helping me.” Thus, reviewing the first part of the Commissioner’s “finding” in light of the whole record before the Commissioner, substantial evidence supports the “finding” that “[e]ither [Hughes] alone or he and Ms. Coster together informed [Employment Security] each week that he was able to work.” *See also Heinmiller*, 127 Wn.2d at 607; *Nguyen*, 144 Wn.2d at 530 (quoting RCW 34.05.570(3)(e)).

Next, we turn to the second part of the Commissioner’s “finding”—that Hughes “personally deposited [Employment Security’s] payments into his bank account.” At the administrative hearing, Hughes testified that he thought he received his unemployment benefit payments by check and he was “sure” that he deposited these checks into his bank account. Hughes never denied that he received unemployment payments for 62 weeks and that he deposited a total of \$22, 630 into his bank account. Additionally, the Commissioner’s Record contains a “Schedule of Claims Report,” which demonstrates that between September 8, 2001, and November 9, 2002, Hughes received a total of 62 payments from Employment Security in the amount of \$365 each. Thus, reviewing this second part of the Commissioner’s finding in light of the whole record before the Commissioner, we hold that this finding is supported by substantial evidence. *See Heinmiller*, 127 Wn.2d at 607; *Nguyen*, 144 Wn.2d at 530 (quoting RCW 34.05.570(3)(e)).

II. Attorney Fees

Hughes argues that if we reverse the Commissioner’s decision, RCW 50.32.160 mandates

that we award him attorney fees and costs. Because we affirm the Commissioner's decision, Hughes is not entitled to attorney fees under this statute.

We affirm the Commissioner's decision that Hughes is "at fault" for "willful nondisclosure" of receiving overlapping workers' compensation and unemployment benefits and, thus, ineligible for waiver of overpayment and liable to repay the \$22,630 overpayment to Employment Security.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Armstrong, J.